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The Reception of Robert Alexy's work in Anglo-American Jurisprudence

At first sight, the work of the German legal philosopher and constitutional theorist, Robert Alexy, appears to offer a welcome counter-example to the general insulation of Anglo-American jurisprudence from continental European influences. Over the last 30 years, his ideas and writings have become increasingly available in English, and they have stimulated a growing engagement in response. However, this immediate impression masks an unevenness in the reception of his work. In this article I trace the history and extent of this reception, contrasting its variability with the internally systemic and coherent quality of Alexy's entire *oeuvre*. I suggest that the causes for this variability are to be found in the intellectual climate of modern anglophone jurisprudence, in which work in the Kantian legal-philosophical tradition is unfamiliar or viewed with caution. A deeper theoretical development needs to take place if his work is to be appreciated holistically. However, there are signs that such a development is taking place, and it is possible that in time the reception of Alexy's work will be seen to be part of that longer-term process.

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The Reception of Robert Alexy's work in Anglo-American Jurisprudence[1]

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1. INTRODUCTION

As John Bell once remarked, the relationship between Anglo-American and continental jurisprudence has too often been one of 'ships passing in the night'.[2] Even if that is true of the work of Gustav Radbruch to which Bell was referring – and we should perhaps be reflecting more on the longer-term consequences of Lon Fuller's stay in Heidelberg in 1929 than on Radbruch's own stay in Oxford a few year later[3] – this cannot be said of his intellectual successor, Robert Alexy. Alexy's three principal works have all been translated into English and are now easily available and widely cited.[4]

A number of commentators, including Mattias Kumm, George Pavlakos, Martin Borowski and Matthias Klatt, have observed that Alexy's work displays a markedly systemic character.[5] The three books, as well as numerous articles and chapters refining and extending the ideas they contain, cohere around a set of distinctive and related theses. This can most easily be seen by reflecting on the implications of his final statement defining law at the end of *The Argument from Injustice*:

> The law is a system of norms that (1) lays claim to correctness, (2) consists of the totality of norms that belong to a constitution by and large socially efficacious and that are not themselves unjust in the extreme, as well as the totality of norms that manifest a minimum social efficacy or prospect of social efficacy and that are not themselves unjust in the extreme, and finally, (3) comprises the principles and other normative arguments on which the process or procedure of law application is and/or must be based in order to satisfy the claim to correctness.[6]

According to Alexy, rational public discourse is both substantively committed to the values of liberal democratic constitutionalism, but is also open-ended, resulting in the practical need for mechanisms of decision-taking and closure. As an institution, law represents that point of closure, but to maintain legitimacy the authoritative system of norms must remain open to influence at numerous points –

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[1] This paper was first presented at a conference in the University of Heidelberg *Modern German Non-Positivism – From Radbruch to Alexy* on 14-15 September 2016. I am grateful to participants at that event, to my colleague Patrick Capps, and to the anonymous reviewer for *Jurisprudence*, for their insightful comments and suggestions.

[2] John Bell, 'Wolfgang Friedmann (1907-1972), with an Excursus on Gustav Radbruch (1878-1949)' in J. Beatson and R. Zimmermann (eds.), *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth-century Britain* (Oxford University Press 2004) 532.

[3] See Kristen Rundle, *Forms Liberate: Reclaiming the Jurisprudence of Lon L. Fuller* (Bloomsbury 2012) 72-3. On Radbruch's stay in Oxford, see Carola Vulpius, *Gustav Radbruch in Oxford* (C.F. Müller Verlag 1995).

[4] *A Theory of Legal Argumentation: The Theory of Rational Discourse as Theory of Legal Justification* (trans. Ruth Adler and Neil MacCormick) (Oxford University Press 1989); *A Theory of Constitutional Rights* (trans. Julian Rivers) (Oxford University Press 2002) and *The Argument from Injustice: A Reply to Legal Positivism* (trans. Stanley L. Paulson and Bonnie Litschewski Paulson) (Clarendon Press 2002).

[5] Mattias Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 International Journal of Constitutional Law 574 at 595; George Pavlakos, 'Introduction' in George Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007); Martin Borowski, 'Discourse, Principles, and the Problem of Law and Morality: Robert Alexy's Three Main Works' (2011) 2(2) Jurisprudence 575-595; Matthias Klatt, 'Robert Alexy's Philosophy of Law as System' in Matthias Klatt (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012).

[6] *The Argument from Injustice* (n 5), 127.

not just in formal legislative acts but also in judicial interpretation and development. The character of law, which rests on a basic norm-theoretical distinction between principles and rules, and the balancing of principles under a liberal constitutional order, are central elements of the pervading openness of law. So law necessarily has a complex dual nature, combining the real acts of authoritative norm-issuance at various institutional levels with perpetual reference back to its ideal purpose as an enterprise engaged in the collective realisation of public reason.[7]

Given the systemic quality of these ideas, we might expect the reception of his ideas into Anglo-American jurisprudence to display a corresponding homogeneity of engagement. But in practice this has been far from the case. Alexy's ideas have not been appropriated or engaged with as a whole. Instead, there have been three quite distinct lines of appropriation, corresponding to each of his principal works. I shall trace in some detail the reception of these ideas, before reflecting on why the disparities of treatment should be so marked. And I shall close with some brief speculation about the future.

2. A THEORY OF LEGAL ARGUMENTATION

The reception of *Theorie der juristischen Argumentation*[8] is associated above all with the work of Neil MacCormick. Indeed, it is arguable that he is still the only legal theorist to have engaged intensively with this book in the anglophone world. MacCormick's own interest in the logical forms of legal reasoning came to early fruition in *Legal Reasoning and Legal Theory* (1978), a work which, as he later pointed out, was almost exactly contemporaneous with Alexy's, and which arrived quite independently at conclusions similar to Alexy's.[9] But from 1981 onwards, MacCormick was appealing to *Theorie der juristischen Argumentation* in support of his own version of the Special Case Thesis, that is, the argument that legal reasoning is a special case of general practical reasoning.[10] A detailed summary of Alexy's work soon followed, although this was not published in a particularly well-known or accessible place for legal philosophers, and it seems to have been barely noticed by other writers.[11] What was noticed, however, was an article which MacCormick wrote for the *Journal of Law and Society* in 1983. Entitled 'Contemporary Legal Philosophy: the Rediscovery of Practical Reason', MacCormick sought to set out what he took to be some of the main trends in modern jurisprudence.[12] Here, he presented the *Theorie* as 'striking and quite independent corroboration' for Joseph Raz's claims about the use of law to restrict resort to open-ended deliberation.[13] A brief summary of the argument followed, concluding with the Special Case Thesis. This then allowed MacCormick to raise doubts about some of Ronald Dworkin's principal theses, while also cautioning that it was not correct to place Alexy alongside Raz on the ramparts of legal positivism.

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[7] Robert Alexy, 'The dual nature of law' (2010) 23(2) Ratio Juris 167-182. For a recent piece on the dual nature of law which emphasises the systemic character of his entire project, see Robert Alexy, 'The Ideal Dimension of Law' in George Duke and Robert P. George (eds.), *The Cambridge Companion to Natural Law Jurisprudence* (Cambridge University Press 2017).

[8] Suhrkamp 1978.

[9] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press 2005), 17 fn. 10.

[10] Neil MacCormick, 'What is wrong with Deceit?', a public lecture given in Sydney in July 1981 and published in (1983) 10 Sydney Law Review 5-19.

[11] Neil MacCormick, 'Legal Reasoning and Practical Reason' (1982) 7 Midwest Studies in Philosophy 271-286.

[12] Neil MacCormick, 'Contemporary Legal Philosophy: The Rediscovery of Practical Reason' (1983) 10 Journal of Law and Society 1-18.

[13] Ibid 6.

MacCormick was unusual in his extensive engagement with this work. Apart from a handful of passing references in the 1980s by continental legal scholars writing occasionally in English (such as Aleksander Peczenik, Jerzy Wroblewski, Kaarlo Tuori and Günther Teubner), the work seems to have sparked no interest whatsoever. It was favourably reviewed by Edgar Bodenheimer in 1985 in the *American Journal of Comparative Law*,[14] but quite apart from the language barrier this location was also unlikely to attract the attention of legal theorists.

The virtue of MacCormick's 1983 article was that it contained a fine overview of contemporary trends in jurisprudence, making it an ideal piece of reading for undergraduate law students – and their teachers. It was quickly picked up by the editors of *Lloyd's Introduction to Jurisprudence*, the largest of the student textbooks, and still the guide to everything conceivably labelled as such. Freeman suggested that this piece above all gave one an insight into 'the real character of contemporary legal philosophy' and he excerpted most of the article.[15] That excerpt survived successive editions until the 9th edition (2014), when it was replaced by a more general reference to the journals *Legal Theory* and *Jurisprudence*, but not *Ratio Juris*. That omission is a significant point to which we must return.

Throughout these, and other pieces, MacCormick's admiration for *Theorie der juristischen Argumentation* was readily apparent. In a 1990 article he referred to it in passing as the 'best structured account' of law's gift to civilisation: its ability to subject practical questions to more narrowly focused forms of argument.[16] His personal motivation to make an English translation available can thus be readily understood. *A Theory of Legal Argumentation* appeared in 1989, translated by Ruth Adler under Neil MacCormick's oversight. At first, the translation looked set to ensure its wider impact. It was very well reviewed in several mainstream and specialist journals. For example, the book was treated favourably alongside Melvin Eisenberg's *The Nature of the Common Law* by Nigel Simmonds in the *Cambridge Law Journal*.[17] Simmonds felt compelled to register a 'mild protest' against Alexy's unwillingness to clarify his own position on certain basic philosophical problems, but otherwise lauded his 'measured and thoughtful' synthesis of the best insights of others.[18] Within the confines of his own critical approach to jurisprudence, even Peter Goodrich was complimentary.[19] Goodrich's review set out the content of the book in some detail. Although he ultimately dismissed the work as 'an elegant but idle examination of purely formal questions', he had the grace to welcome its 'call for greater rigour in the definition and exposition of a theory of the discursive rationality of legal argumentation'.[20]

Neil Duxbury's brief review for the *Modern Law Review* was even more positive: for him there was 'no immediately comparable text in English' to this 'pioneering contribution to rationalist legal philosophy'.[21] Like Nigel Simmonds, he too expressed a hope for more of such rare glimpses of continental legal philosophy. Peter Ingram also reviewed the book in the *Northern Ireland Legal Quarterly*.[22] But by far the fullest and most glowing of reviews came from the pen of David Richards

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[14] (1985) 33 American Journal of Comparative Law 541-3.
[15] Dennis Lloyd and M.D.A. Freeman (eds.), *Lloyd's Introduction to Jurisprudence* 5th edn. (Sweet & Maxwell 1985), 398.
[16] Neil MacCormick, 'Reconstruction after Deconstruction: A response to CLS' (1990) 10 Oxford Journal of Legal Studies 539-558 at 554 fn 34.
[17] (1989) 48(3) Cambridge Law Journal 522-525.
[18] Ibid 524.
[19] (1990) 10 Legal Studies 116-122.
[20] Ibid 120 and 117 respectively.
[21] (1990) 53 Modern Law Review 569-570.
[22] (1990) 41 Northern Ireland Legal Quarterly 199-201.

in *Ratio Juris*.[23] 'Alexy's book should be regarded as a central expression of an intellectual, moral, and political project that must absorb the minds and hearts of people everywhere moved by its values of a politics of reasonable civility, mutual respect and liberal freedom.'[24] Richards concluded that this work represented 'the most intellectually and ethically valuable project for legal and moral theory to pursue today.'[25] That is a quite remarkable tribute.

But in spite of this immediately joyous reception, *A Theory of Legal Argumentation* largely failed to stimulate debate in English-language works. Soon after its publication, Juha-Pekka Rentto published a critique from the perspective of Thomist thought, suggesting that the theory should be understood primarily as concerned with 'the universal rationality of validation rather than with the rightness of the particular actions in which the discourse may conclude.'[26] In other words, Rentto failed to see the role of law within the collective determination of moral correctness. He also criticised the implicit scientism of the *Theory*, as well as its failure to pay attention to the role of the will and conscience in ethics. Such a detailed engagement in the literature was rare. Of course, around the time of its publication one can find brief passing references among those who were well-enough read to have come across it.[27] Vaughan Lowe even managed to make creative use of it in his discussion of equity in international law.[28] But these initial references soon died out, and, with the exceptions to be referred to shortly, references thereafter became unusual and sporadic.

The exceptions can be found almost entirely in the journal *Ratio Juris*, founded in 1987 with a specifically international and continental European focus. Until recently, this is where Robert Alexy has published most of his English-language articles, indeed it is not unfair to see his work as forming one of the main objects of the journal's attention. Here is where one finds critical and constructive work on the discourse-theory of law, both specifically related to Alexy's theory – see, for example, Ota Weinberger's critiques[29], or Bev Clucas's comparison with the 'Sheffield School' of Beyleveld and Brownsword[30] – and more generally.[31] And this is where some rounds of the debate about the Special Case Thesis have been carried on with participants such as Ingrid Dwars, Klaus Günther George Pavlakos and Emmanuel Melissaris.[32]

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[23] (1989) 2 Ratio Juris 304-317.
[24] Ibid 305.
[25] Ibid 316.
[26] Juha-Pekka Rentto, 'Aquinas and Alexy: A Perennial View to Discursive Ethics' (1991) 36 American Journal of Jurisprudence 157-176, 168.
[27] E.g. Lawrence B. Solum, 'Virtues and Voices' (1990) 66 Chicago-Kent Law Review 111-140, 126; Frederick Schauer, 'Reflections on the Value of Truth' (1991) 41 Case Western Reserve Law Review 699-724, 705.
[28] Vaughan Lowe, 'The role of equity in international law' (1992) 12 Australian Year Book of International Law 54-81, 70-71.
[29] Ota Weinberger, 'Conflicting Views on Practical Reason: Against Pseudo-Arguments in practical Philosophy' (1992) 5 Ratio Juris 252-268.
[30] Bev Clucas, 'The Sheffield School and Discourse Theory: Divergences and Similarities in Legal Idealism/Anti-Positivism' (2006) 19 Ratio Juris 230-244.
[31] See, e.g., Kaarlo Tuori, 'Discourse Ethics and the Legitimacy of Law' (1989) 2 Ratio Juris 125-143; Manuel Atienza, 'Practical Reason and Legislation' (1992) 5 Ratio Juris 269-287; Stuart Toddington, 'The Moral Truth about Discourse Theory' (2006) 19 Ratio Juris 217-229; Antonino Rotolo and Corrado Roversi, 'Norm Enactment and Performative Contradictions' (2009) 22 Ratio Juris 455-482.
[32] Ingrid Dwars, 'Application Discourse and the Special Case-Thesis' (1992) 5 Ratio Juris 67-78; Klaus Günther, 'Critical Remarks on Robert Alexy's "Special-Case Thesis"'(1993) 6 Ratio Juris 143-156; Georgios Pavlakos, 'The Special Case Thesis: An Assessment of R. Alexy's Discursive Theory of Law' (1998) 11 Ratio Juris 126-154; Emmanuel Melissaris, 'The Limits of Institutionalised Legal Discourse' (2005) 18 Ratio Juris 464-483.

However, discussions of the discourse-theory of law outside of the context of *Ratio Juris* are very rare.[33] The omission of *Ratio Juris* mentioned in connection with Lloyd and Freeman's textbook is thus significant: it sits firmly on the deck of John Bell's 'continental' ship. There are very few pieces of work systematically relating Alexy's discourse-theory to existing Anglo- American jurisprudence. Indeed, one has to look to the pages of a student law journal to find a more than cursory example: the *UCL Jurisprudence Review*. In 2004, Ioannis Natsinas published a competent and careful comparison of Alexy's and Dworkin's theories.[34] He concluded that they were compatible, but that Alexy offered the better account of the justification of individual decisions. He also noted that Alexy's theory is broader, in the sense that certain justificatory arguments are included which are relativized or suppressed in Dworkin's scheme. The example in point is the use of genetic interpretation. His conclusion is a fair one: 'We can generalise this remark to note that Alexy's catalogue of arguments anticipates a conception of law like the one Dworkin provides, namely one that provides a program of interpretation.'[35] We could put this another way: Dworkin's theory is more obviously beholden to a specific normative political theory. I will return to the comparison with Dworkin at the end of this article.

The sense that 'legal argumentation' represents a failed conversation between continental and Anglo-American jurisprudence is confirmed even in those works which try to bridge the gap. In George Pavlakos's edited collection on Alexy's work,[36] with the exception of Maeve Cooke's essay on law's claim to correctness, the engagement with discourse-theory is represented by continental legal scholars: Giovanni Sartor (EUI), Bongiovanni, Rotolo and Roversi (all Bologna), Heidemann (Kiel) and Brozek (Krakow). In Matthias Klatt's collection,[37] one of the essays on legal argumentation is better treated as part of the theory of norms (i.e. Frederick Schauer on balancing and subsumption). That leaves two essays, another by Maeve Cooke, who has spent considerable periods of time studying in Germany, and one by Cristina Lafont, who while now based in the US, did her first doctorate and *habilitation* at Frankfurt. Exceptionally, one potential application of the Special Case Thesis can be found in the theory of legal pluralism, which struggles to identify usefully the boundaries between 'law' and other socially efficacious normative orders. Emmanuel Melissaris takes a discussion of the Special Case Thesis as a launching-point for his attempts in this direction, as does, rather more positively, Russell Sandberg.[38]

Among those who do pursue an interest in legal argumentation, Stefano Bertea's 2005 article on the nature of arguments from coherence is revealing.[39] Although it acknowledges work by Robert Alexy and others closely related such as Aulis Aarnio and Aleksander Peczenic, it draws substantially on Neil MacCormick's work, and also the work of the 'Amsterdam School' of theorists, pre-eminently

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[33] For an exception, see Hannu Tapani Klami, 'Legal Argument and Decision' (1992) 37 American Journal of Jurisprudence 171-184.

[34] Ioannis Natsinas, 'Discursive justification and the interpretive attitude' [2004] UCL Jurisprudence Review 328-356.

[35] Ibid 354.

[36] George Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007).

[37] Matthias Klatt (ed.), *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012). Klatt's own extensive engagement with Alexy's theory can be found in Matthias Klatt, *Making the Law Explicit: The Normativity of Legal Argumentation* (Hart Publishing 2008), which is a translation of an earlier study in German.

[38] Emmanuel Melissaris, *Ubiquitous Law: legal theory and the space for legal pluralism* (Ashgate 2009); Russell Sandberg, 'The Failure of Legal Pluralism' (2016) 18 Ecclesiastical Law Journal 137-157.

[39] Stefano Bertea, 'The Arguments from Coherence: Analysis and Evaluation' (2005) 25 Oxford Journal of Legal Studies 369-391.

Eemeren and Grootendorst. In her very helpful overview, *Fundamentals of Legal Argumentation* Eveline Feteris, who also belongs to the Amsterdam school, provides an account which finds theoretical foundations in the work of Stephen Toulmin, Chaim Perelman and Jürgen Habermas.[40] In her account, the principal theorists hitherto applying argumentation theory to law are Neil MacCormick, Robert Alexy, Aulis Aarnio and Aleksander Peczenik. But, for her, this work reaches its highest form of development in the pragma-dialectical approach of the Amsterdam School. One gets the strong impression that legal argumentation is the preserve of continental scholars, and that Alexy's work in this area no longer represents the primary point of reference.

It is not uncommon to find chapters on 'theories of adjudication' in student textbooks, but the preference for this heading is telling. The relatively recent textbook by Scott Veitch, Emilios Christodoulidis and Lindsay Farmer is exceptional in containing a substantial section devoted to 'legal reasoning' instead.[41] But once again the coverage is typical: 'general themes' include legal formalism, American Legal Realism, the open texture of rules (which relies mainly on an account of MacCormick's earlier work characterised not unfairly as 'extended formalism', law as interpretation (i.e. Ronald Dworkin) and Critical Legal Studies. The 'advanced topics' are applied and/or critical in orientation: justice, natural law and the limits of rule-following (with discussion of a case in bioethics), feminist critiques, trials, facts and narratives, judging in conditions of systemic race discrimination and law and deconstruction. The analytical work of the Bielefeld Circle or the Amsterdam School appears nowhere.

The same story could be told again and again. Gerald Postema's magisterial overview of legal philosophy in the 20th century common law world notes the turn in the late 20th century towards law as a discursive practice and as a field of practical reason, but the only citations are to Alexy's defence of the Radbruch formula and the necessary relations between law and morality.[42] The *Oxford Handbook of Jurisprudence and Philosophy of Law* (2002) contains essays on adjudication (William Lucy), constitutional and statutory interpretation (Kent Greenawalt), methodology (Jules Coleman) and reasons (John Gardner and Timothy Macklem) but not a word anywhere of *A Theory of Legal Argumentation*. The *Blackwell Companion to Philosophy of Law and Legal Theory* (1996) does a little better. There, buried between Law and economics, formalism, Marxism, and deconstruction is an essay on German jurisprudence by Alexander Somek.[43] In a couple of sentences he notes the interpretative approaches of Esser, Kaufmann and Mueller, the value jurisprudence of Larenz and Canaris, and the move towards seeing adjudication as balancing in a complex scheme of principles.

> 'German jurisprudence, therefore, had been prepared for Dworkin's ideas when, in the late 1970s, the reception took place in the writings of Robert Alexy. Earlier, the same author had first introduced Jürgen Habermas's theory of rational discourse to jurisprudential readership, transforming it into a theory of legal argumentation.'[44]

This cannot be seen as anything other than a needle in the proverbial haystack. Cristobal Orrego's 2011 lecture on 'Gains and Losses in Jurisprudence' is absolutely telling:

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[40] Kluwe 1999.
[41] *Jurisprudence: Themes and Concepts* (Routledge 2007), Part II.
[42] Gerald J. Postema, *Legal Philosophy in the Twentieth Century* (Springer 2011).
[43] Alexander Somek, 'German legal philosophy and theory in the nineteenth and twentieth centuries' in D. Patterson (ed.), *A Companion to Philosophy of Law and Legal Theory* (Blackwell 1996).
[44] Ibid 352.

> 'In Europe, Robert Alexy revived Radbruch's formula that extreme injustice cannot be law and has put Habermas's discourse ethics to the service of a form of natural law than many prefer to call 'anti-positivist' or 'non-positivist' form of legal theory.'[45]

His footnote then references Alexy's piece on John Finnis in the *American Journal of Jurisprudence* and the *Theory of Constitutional Rights*! In other words, the discourse-theoretical grounding of Alexy's work has receded right into the background and is replaced with a focus on the matters of immediate interest: the debate between natural law and legal positivism on one hand, and constitutional adjudication on the other. When theorists discuss the claim to correctness it is almost always in the context of Alexy's defence of the Radbruch Formula or the *Argument from Injustice*, not as set out in *A Theory of Legal Argumentation*, where it first arises.

So, let us turn to *The Argument from Injustice*.

3. THE ARGUMENT FROM INJUSTICE

The English translation of *Begriff und Geltung des Rechts* (1992) was not published until 2002, although the main lines of argument had already appeared in articles in *Ratio Juris*. However, what brought Alexy's distinctive case for a non-positivist concept of law to wider notice was the chapter he wrote for a collection of essays edited by David Dyzenhaus in 1999.[46] By setting out to defend the Radbruch Formula, Alexy connected with a familiar element of Anglo-American jurisprudential debate, since it was Radbruch's enagagement with the problem of unjust laws which appeared in the famous 1957 exchange between H.L.A. Hart and Lon Fuller, recorded in the pages of the *Harvard Law Review*.[47] Even though that debate is notorious for its inadequate representation of the post-war cases and Radbruch's full position,[48] it has at least the virtue of introducing his name. Not only did Alexy set out to defend Radbruch, but in doing so he summarised all the main elements of his own anti-positivist argument. Here we find the distinction between observer and participant perspectives, classifying and qualifying relations between law and morality, and analytical and normative arguments for concepts of law. The argument from correctness is sketched out, and the normative case for Radbruch's formula is made.

As well as favourable reviews of the collection as a whole, the chapter was immediately noted by Michael Freeman in the next edition of Lloyd's *Introduction to Jurisprudence*. Writing in the preface he called it 'the best entrée into Radbruch and thus the Hart-Fuller debate that I have seen, and an excellent teaching instrument'.[49] The following edition supplemented this with the Paulsons' translation of 'Gesetzliches Unrecht' in the 2006 *Oxford Journal of Legal Studies*.[50] Since then an

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[45] Cristobal Orrego, 'Gains and Losses in Jurisprudence since H.L.A. Hart' (2014) 59 American Journal of Jurisprudence 111-132, 126.

[46] Robert Alexy, 'In Defence of Radbruch's Formula' in D. Dyzenhaus (ed.), *Recrafting the Rule of Law* (Hart Publishing 1999).

[47] H.L.A. Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 Harvard Law Review 593- 629; Lon Fuller, 'Positivism and Fidelity to Law – a reply to Professor Hart' (1958) 71 Harvard Law Review 630-672.

[48] See, already, H.O. Pappe, 'On the validity of judicial decisions in the Nazi era' (1960) 23 Modern Law Review 260-274.

[49] M.D.A. Freeman (ed.), *Lloyd's Introduction to Jurisprudence*, 7th edn. (Sweet & Maxwell 2001), vi.

[50] Gustav Radbruch, 'Statutory Lawlessness and Supra-Statutory Law' (1946) (2006) 26 Oxford Journal of Legal Studies 1-12. See also 'Five Minutes of Legal Philosophy (1945) (2006) 26 Oxford Journal of Legal Studies 13-16; Stanley L. Paulson, 'On the Background and Significance of Gustav Radbruch's Post-War Papers' (2006) 26 Oxford Journal of Legal Studies 17-40.

increasing number of jurisprudence textbooks have referred to this translation of Radbruch's famous essay, and some of these also refer to Alexy's defence. The fullest of these accounts is included in the textbook by Scott Veitch, Emilios Christodoulidis and Lindsay Farmer already referred to.[51]

Thus for an increasing number of writers, an interest in Radbruch now leads naturally to a reference to Alexy.[52] This is how it features in Leslie Green's '25th anniversary essay' on General Jurisprudence.[53] For some, the trigger has been the East German border guard trials after German reunification.[54] Among better known legal philosophers, the best example is Brian Bix, who takes the Radbruch Formula as a launch pad for a critique of Alexy's conflation of legal theory with legal practice, as well as casting doubts on the claim to correctness.[55] Bix arguably reads Alexy through excessively Dworkinian lenses by assuming that his theory is built on reflections on how to deal in practice with grossly unjust laws. In his latest, essentially favourable, comment on Alexy's 2015 article, 'Legal Certainty and Correctness'[56] he still worries that Alexy, like Radbruch before him, have 'not offered enough arguments for treating their views as being conceptual claims about the nature of law rather than prescriptive claims for how judges should decide cases.'[57] The solution here is surely to look again at the reasons for adopting a participant perspective and the role of normative arguments in determining the concept of law.

When *The Argument from Injustice* appeared in full, it was not very widely reviewed, although George Pavlakos and Neil Walker gave it very complimentary and supportive reviews in the *Modern Law Review* and *Legal Studies* respectively.[58] Apart from that it was subject to a thoughtful account by Tan Seow Hon in the *Singapore Journal of Legal Studies*, and an extensive and critical review by Danny Priel in the *Australian Journal of Legal Philosophy*.[59] However, quite unlike the *Theory of Legal Argumentation*, Alexy's non-positivism had now caught the attention of several major English-speaking legal philosophers. Joseph Raz, John Gardner, Dennis Patterson, Mark Murphy and John Finnis have each engaged in depth with aspects of Alexy's argument.

Much of the debate has surrounded the 'claim to correctness', not least because other thinkers make closely allied observations. Writing in 2010, Maris K. Tinture suggested that it was the reception of Alexy's work which had revived interest in the question of what, if anything, law claims,[60] and my own impression is that it is the claim to correctness which is most often associated

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[51] See n 42 above.

[52] See also, for example, Giovannangelo de Francesco, 'Radbruch Formula and Criminal Law' (2003) 1 Journal of International Criminal Justice 728-736.

[53] Leslie Green, 'General Jurisprudence: A 25th Anniversary Essay' (2005) 25 Oxford Journal of Legal Studies 565-580.

[54] Adrian Kuenzler, 'Judicial Legitimacy and the Role of Courts: Explaining the Transitional Context of the German Border Guard Cases' (2012) 32 Oxford Journal of Legal Studies 349-382. This was also the incentive for my own reflections on the Hart-Fuller debate and subsequent jurisprudential developments. See Julian Rivers, 'The Interpretation and Invalidity of Unjust Laws' in D. Dyzenhaus (ed.), *Recrafting the Rule of Law* (Hart Publishing 1999) 40-65.

[55] Brian Bix, 'Robert Alexy, Radbruch's Formula and the Nature of Legal Theory' (2006) 37 Rechtstheorie 139-149. See also Brian Bix, 'Global Error and Legal Truth' (2009) 29 Oxford Journal of Legal Studies 535-548, and Brian Bix, 'Radbruch's Formula and Conceptual Analysis' (2011) 56 American Journal of Jurisprudence 45-58.

[56] Robert Alexy, 'Legal Certainty and Correctness' (2015) 28 Ratio Juris 441-451.

[57] Brian Bix, 'Alexy's Anti-Positivism' JOTWELL (May 11, 2016).

[58] (2004) 67 *Modern Law Review* 342-346; (2004) 24 Legal Studies 480-484.

[59] [2003] Singapore Journal of Legal Studies 302-310; Danny Priel, 'Alexy on the Connection between Law and Morality' (2004) 29 Australian Journal of Legal Philosophy 140-159.

[60] Maris Kopcke Tinture, 'Law Does Things Differently' (Reviewing Stefano Bertea, *The Normative Claim of Law*) (2009) 55 American Journal of Jurisprudence 201-224, 217.

with Alexy's name. Raz says that law claims legitimate authority;[61] Soper retorts that it claims justice.[62] Ronald Dworkin and Neil MacCormick are both unhappy with the idea that law claims anything at all.[63] And many others have expressed views on this question. The claim-sceptics argue that even allowing for its metaphorical nature, since it is people who make claims, not states of affairs such as institutionalised normative orders, the metaphor is an unhelpful one. If anything is to be personified, it is the state, and it is important that we create the conceptual space for an unlawful state (*pace* Kelsen). Having said that, MacCormick, for example, found himself much closer to Alexy's account than Raz's, whose suggestion that law must make a moral claim to offer exclusionary reasons for action MacCormick rejected as far too strong a condition.[64]

John Gardner defends a position which is the polar opposite of MacCormick's. He vigorously defends the idea of law's making claims against sceptics such as Dworkin, but thinks that the nature of the claim law makes is to moral authority, not to moral correctness.[65] Indeed, he also thinks that a claim to moral correctness points in the direction of legal positivism, since logically to claim something must countenance the possibility of being mistaken.[66] One might retort that this is precisely why 'weak' natural lawyers such as Alexy want to characterise law which fails to be morally correct as defective as law, rather than necessarily invalid.[67] Bas van der Vossen also arrives at Raz's position after extensive engagement with Philip Soper, and to a lesser extent, Alexy.[68]

Joseph Raz's own critique of Alexy has a much broader focus.[69] While professing a considerable measure of agreement, he nonetheless rejects the positivism/anti-positivism distinction as unhelpful, and Alexy's definition of positivism by reference to the separation thesis as incorrect. He does not think that there are two competing perspectives on law (observer and participant) although it is possible that there are two different concepts of law. The fact that the claim to correctness is a moral claim has no implications for whether the law is actually morally correct, and it does not follow from the fact that officials think they have a moral duty to set aside grossly unjust laws that it is the law which authorises this (which is the core of the argument from injustice). And finally, the fact that judges use normative sources such as principles to resolve disputes does not make those sources legal ones. This is nothing less than a root-and-branch refutation of the main elements of *The Argument from Injustice*, and it is unsurprising that Alexy offers a similarly comprehensive reply grounded above all in the fact-ideal distinction.[70]

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[61] Joseph Raz, *The Authority of Law* (Clarendon Press 1979) 28-33.
[62] Philip Soper, 'Law's Normative Claims', in: R. George (ed.), *The Autonomy of Law* (Oxford University Press 1996).
[63] Ronald Dworkin, 'Thirty Years On' (2002) 115 Harvard Law Review 1655-1688; Neil MacCormick, 'Why Law Makes No Claims', in: G. Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007).
[64] Neil MacCormick, 'Why Law Makes No Claims' (n 63), 65.
[65] John Gardner, 'How Law Claims, What Law Claims', in: M. Klatt (ed.), *Institutionalised Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012).
[66] Ibid 42.
[67] Of course, Alexy is not a completely 'weak' natural lawyer like Finnis, since he (Alexy) accepts that there are good normative arguments for adopting limited institutional consequences in response to unjust laws.
[68] Bas van der Vossen, 'Assessing Law's Claim to Authority', in: Oxford Journal of Legal Studies 31 (2011), pp. 481-501.
[69] Joseph Raz, 'The Argument from Injustice, or How Not to Reply to Legal Positivism', in: G. Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007).
[70] Robert Alexy, 'An Answer to Joseph Raz', in: G. Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007).

Dennis Patterson mounts a rather different sort of attack on the claim that there is a 'necessary' connection between law and morality.[71] Patterson points out that the idea of conceptual necessity is philosophically problematic, and that Alexy does not explain what he means by 'necessity'. Patterson sides with Quine in rejecting the synthetic/analytic distinction, and wants to see those concerns addressed. This is a significant point, as Quine's implicit dominance in Anglo-American jurisprudence is an important element in understanding the general resistance to Alexy's ideas. John Finnis likewise is uncomfortable with an approach to legal theory which depends on a search for conceptual necessities.[72]

Finally, and by contrast, Mark Murphy discusses Alexy's theory in highly supportive terms:

> Both John Finnis and Robert Alexy hold that law that lacks an adequate rational basis for compliance is defective as law... But only Alexy offers the right sort of argument to sustain this thesis…It is thus crucial for natural law jurisprudence that it follow Alexy's rather than Finnis's lead.[73]

Murphy explains that what natural law theorists have in common is the explanatory priority of law's normative non-defectiveness conditions. He is also agnostic on the institutional consequences of defectiveness. By contrast, Finnis is notoriously 'positivistic' on the practical consequences of unjust laws.[74] But where Murphy thinks that Alexy is superior to Finnis is that the argument from methodology in the opening chapter of *Natural Law and Natural Rights* fails, but the argument from illocutionary acts (i.e. the claim to correctness) succeeds.[75] Murphy's endorsement is significant because he offers one of the finest accounts of the range of possible natural law theories and their defence. As Jonathan Crowe has argued, both he and Alexy form part of a growing modern school of natural law theory beyond the new Natural Law Theory of thinkers including Finnis, Grisez, Boyle, George and Bradley, who are often assumed to dominate the field.[76]

Another type of evidence for the fact that Alexy's non-positivism has been recognised as a major position within the debate comes in the form of passing references which take for granted the idea that the reader is familiar with the position. For example, in his defence of descriptive legal positivism, Andrei Marmor refers in passing to the traditional natural law doctrine that moral considerations form a necessary condition of legal validity, and suggests that Alexy maintains this position.[77] In general terms, it is strikingly apparent that there is a gap in references to Alexy between the early 1990s, after initial interest in *A Theory of Legal Argumentation* had died down, to

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[71] Dennis Patterson, 'Alexy on Necessity in Law and Morals' (2012) 25 Ratio Juris 47-58.
[72] John Finnis, 'Law as Fact and as Reason for Action: A Response to Robert Alexy on Law's Ideal Dimension' (2014) 59 American Journal of Jurisprudence 85-109.
[73] Mark C. Murphy, 'Defect and Deviance in Natural Law Jurisprudence', in: M. Klatt (ed.), *Institutionalised Reason: The Jurisprudence of Robert Alexy* (Oxford University Press 2012), 45.
[74] John Finnis, *Natural Law and Natural Rights* (Clarendon Press 1980), ch. 12; John Finnis, 'Law as Fact and Law as Reason' (n 72).
[75] See also, Mark C. Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press 2006), ch. 2.
[76] Jonathan Crowe, 'Natural Law Beyond Finnis' (2011) 2 Jurisprudence 293-308. Crowe later laments the fact that in her otherwise excellent work on Fuller, Kristen Rundle fails to engage with Alexy's thesis of the dual nature of law, which has illuminating parallels with some of Fuller's work. See Jonathan Crowe, 'Beyond Morality and Efficacy: Reclaiming the Natural Law Theory of Lon Fuller' (2014) 5 Jurisprudence 109-118.
[77] Andrei Marmor, 'Legal Positivism: Still Descriptive and Morally Neutral' (2006) 26 Oxford Journal of Legal Studies 683-704, 689.

the mid-2000s. Consider now these two quotations, both from works in 2015. Here is Kevin Walton writing in the journal *Jurisprudence*:

> 'Joseph Raz is arguably the most important of several legal philosophers who conceive of their subject as inescapably and exclusively concerned with the *a priori* identification of law's essential and significant qualities. Leiter rightly includes him in this group of theorists, to which, regardless of the assorted differences between them, at least John Gardner …. Robert Alexy, Julie Dickson and Scott Shapiro also seem to belong.'[78]

Mark Murphy, writing in the *American Journal of Jurisprudence* about natural law theory in general says this:

> 'Critics of specific natural law jurisprudential theories – critics of theories like Thomas Aquinas's, Thomas Hobbes, Lon Fuller's, John Finnis's, Robert Alexy's, Michael Moore's, perhaps even Ronald Dworkin's – might attack these theories by confronting the specific arguments offered by these authors for their positions.'[79]

Noscitur a sociis. These references are designed to function as triggers expecting the reader to call to mind basic features of their work to make the author's point. In that sense one can say that Robert Alexy's *Argument from Injustice* has established itself as a leading position in the range of possible theories of law. By complete contrast with the work on legal argumentation, it has entered into the mainstream of Anglo-American jurisprudential consciousness.

4. A THEORY OF CONSTITUTIONAL RIGHTS

There can be little doubt that of Alexy's three works, it is *A Theory of Constitutional Rights* which has received the most exposure. In part this must be due to the fact that that unlike legal theory, public law benefits from both scholarly interest and practical application. Somewhat rarefied debates about, for example, the precise nature of a conceptual or necessary connection between law and morality, only excite relatively small numbers of legal philosophers. It is no surprise that *Constitutional Rights* has been cited many more times in court judgments across the world than either of the other works.[80] But the number of academic citations is far greater as well. This started with several reviews and review articles on the publication of the English translation,[81] but has also extended since then to a growing and ever more complex debate about the structure of constitutional justice.

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[78] Kevin Walton, 'Legal Philosophy and the Social Sciences: The Potential for Complementarity' (2005) 6 *Jurisprudence* 231-251, 245.

[79] Mark C. Murphy, 'Two Unhappy Dilemmas for Natural Law Jurisprudence' (2015) 60 American Journal of Jurisprudence 121-142, 122.

[80] Although note the references to *A Theory of Legal Argumentation* by Trstenjak AG in *Quelle AG v Bundesverband der Verbraucherzentralen und Verbraucherverbände* Case C-404/06 (17 April 2008).

[81] Lorenzo Zucca in (2004) 53 International and Comparative Law Quarterly 247; Philippos C. Vasiloyannis in (2004) 55 Northern Ireland Law Quarterly 206-208; William Ewald, 'The Conceptual Jurisprudence of the German Constitution' (2004) 21 Constitutional Commentary 591-601; Neil Walker (2004) 24 Legal Studies 480-484; Mattias Kumm, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 International Journal of Constitutional Law 574-596; Gerhard van der Schyff (2004) 4 Journal of South African Law 770-771; Aileen Kavanagh, 'Comparative Perspectives on Constitutional Law: Implications for the Human Rights Act 1998' (2004) 10 European Public Law 161-177.

Most of the numerous references are simply in passing, as the author locates his or her argument in relation to the wider field. However, in a number of cases writers have adopted aspects of *Constitutional Rights* to inform their own thinking. Examples include the general right to liberty,[82] the distinction between rules and principles,[83] socio-economic rights,[84] the structure of proportionality,[85] limitations of rights,[86] the broad or narrow scope of rights,[87] the general right to equality,[88] principles as optimisation requirements,[89] measuring deference,[90] and the conceptual structure of rights.[91]

In relatively few cases have writers sought to extend the *Theory* by applying it to new contexts and new problems. In this category I would place my own work, not simply rendering it useful for the British context, but seeking to develop it to assist in resolving problems of judicial deference and restraint, the need for statutory authorisation, and the burden of proof.[92] To the extent that this has captured the interest of public law scholars across the common law world, it has directed them back to Alexy's *Theorie* as the original source of ideas. Alan Brady's superb study of proportionality and deference under the British Human Rights Act 1998 also reworks Alexy's theory in an institutionally sensitive way to reflect differences between administrative decision-taking, non-parliamentary rule-making and primary legislation.[93] He then looks closely at three different contexts: immigration, criminal justice and housing law to see how these ideas work in practice. His reflections on the way

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[82] Antje Pedain, 'The Human Rights Dimension of the *Diane Pretty* Case' (2003) 62 Cambridge Law Journal 181-206.

[83] Gustavo Zagrebelsky, 'Ronald Dworkin's Principle based Constitutionalism: An Italian Point of View' (2003) 1 International Journal of Constitutional Law 621-650; Kai Ambos, 'Judicial Creativity at the Special Tribunal for Lebanon: is there a crime of terrorism under international law?' (2011) 24 Leiden Journal of International Law 655-675.

[84] Octavio L. Ferraz, 'Poverty and Human Rights' (2008) 28 Oxford Journal of Legal Studies 585-604; David Bilchitz, 'Socio-economic rights, economic crisis, and legal doctrine: a rejoinder to Xenophon Contiades and Alkmene Fotiadou' (2014) 12 International Journal of Constitutional Law 747-750.

[85] Eva Brems, 'Human Rights: Minimum and Maximum Perspectives' (2009) 9(3) Human Rights Law Review 349-372; Patricia Popelier and Catherine van de Heyning, 'Procedural rationality: giving teeth to the proportionality analysis' (2013) 9 European Constitutional Law Review 230-262.

[86] Nicholas Croquet, 'The right to self-representation under the European Convention on Human Rights: what role for limitation analysis?' (2012) 3 European Human Rights Law Review 292-308.

[87] Ingrid Leijten, 'From Stec to Valkov: Possessions and Margins in the Social Security case law of the European Court of Human Rights' (2013) 13 Human Rights Law Review 309-350.

[88] Madis Ernits, 'The principle of equality in the Estonian Constitution: a systematic perspective' (2014) 10 European Constitutional Law Review 444-480.

[89] Eva Brems and Laurens Lavrysen, '"Don't use a sledgehammer to crack a nut": less restrictive means in the case law of the European Court of Human Rights' (2015) 15 Human Rights Law Review 139-168.

[90] Cora Chan, 'A preliminary framework for measuring deference in rights reasoning' (2016) 14 International Journal of Constitutional Law 851-882.

[91] Rafael Domingo, 'The constitutional justification of religion' (2016) 18 Ecclesiastical Law Journal 14-35.

[92] Julian Rivers, 'Introduction', in: Robert Alexy, *A Theory of Constitutional Rights* (trans. Julian Rivers) (Oxford University Press 2002); Julian Rivers, 'Proportionality and Variable Intensity of Review' (2006) 65 Cambridge Law Journal 174-207; Julian Rivers, 'Proportionality and Discretion in international and European law', in N. Tsagourias (ed.), *Transnational Constitutionalism* (Cambridge University Press 2007) 107-131; Julian Rivers, 'Proportionality, Discretion and the Second Law of Balancing', in G. Pavlakos (ed.), *Law, Rights and Discourse: The Legal Philosophy of Robert Alexy* (Hart Publishing 2007), 167-188; Julian Rivers, 'Constitutional Rights and Statutory Limitations', in M. Klatt (ed.), *Institutionalized Reason: the jurisprudence of Robert Alexy* (Oxford University Press 2012), 248-271; Julian Rivers, 'The Presumption of Proportionality' (2014) 77 Modern Law Review 409-433.

[93] Alan D.P. Brady, *Proportionality and Deference under the UK Human Rights Act: An Institutionally Sensitive Approach* (Cambridge University Press 2012).

in which proportionality operates within multi-level decision-taking in the final field are particularly insightful.

Where *Constitutional Rights* has been subject to critique, the challenges have been directed towards constitutional theories of its type rather than Alexy's work in particular. However, Alexy has acquired a certain pre-eminence in the references. Charles-Maxime Panaccio even calls him 'the father of proportionality'.[94] Most notably, there has been a vigorous debate about the merits of proportionality, and of balancing more generally. Closely connected with that is a debate about incommensurability. There are book length treatments of the topic, some negative (one thinks of Gregoire Webber's *The Negotiable Constitution*)[95] and some positive (Aharon Barak, *Proportionality*).[96] Kai Möller makes proportionality the central doctrine of his global model of constitutional rights,[97] and David Beatty has secured for himself a permanent place in the footnotes of constitutional theory by even describing it as 'the ultimate rule of law'.[98] And there have been whole issues of journals devoted to the topic. The ICON debate springs immediately to mind.[99] In truth, the literature on proportionality has become rather overwhelming.

I must confess to finding both extremes in the debate over proportionality rather puzzling. One unhelpful argument, which lingers on, is that proportionality is a culturally contingent form of legal argumentation, which happened to emerge in the late 19th century Prussian administrative state and has since rather unaccountably taken Europe, and indeed the world, by storm.[100] Proportionality as *Pickelhaube*! Some writers seem to assume that we face a choice about whether to adopt it. But as the ethical intuitionist W.D. Ross pointed out, the best one can do when faced with incompatible duties is seek to mitigate moral losses and ultimately judge which duty is to override the other.[101] At its core there is little more to proportionality than that. On the other hand, there is much more to be said, not merely substantively in terms of the basic constitutional values at play, but also structurally in terms of the proper processes of argumentation and the institutional balances at stake. Proportionality in practice is not raw moral intuitionism, but must be framed within a system of law.[102]

Panaccio's 2011 article defending proportionality focuses in particular on the way in which burdens of proof or argument, presumptions and ideas of defeasibility come alongside proportionality itself

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[94] Charles-Maxime Panaccio, 'In Defence of Two-Step Balancing and Proportionality in Rights-Balancing' (2011) 24 Canadian Journal of Law and Jurisprudence 109-128, 118. Of course, it is questionable whether a rational doctrine can really have a 'father'.

[95] Cambridge University Press 2009.

[96] Cambridge University Press 2012.

[97] Kai Möller, *The Global Model of Constitutional Rights* (Oxford University Press 2012).

[98] David M. Beatty, *The Ultimate Rule of Law* (Oxford University Press 2004).

[99] Stavros Tsakyrakis, 'Proportionality: An Assault on Human Rights?' (2009) 7 International Journal of Constitutional Law 468-493; Mahav Khosla, 'Proportionality: An Assault on Human Rights? A Reply' (2010) 8 International Journal of Constitutional Law 298-306, and subsequent rejoinders; Matthias Klatt and Moritz Meister, 'Proportionality – a benefit to human rights? Remarks on the I*CON controversy' (2012) 10 International Journal of Constitutional Law 687-708.

[100] This is the tendency of the otherwise helpful work of Moshe Cohen-Eliya and Iddo Porat. See 'American Balancing and German Proportionality' (2010) 8 International Journal of Constitutional Law 263-286, and at greater length, *Proportionality and Constitutional Culture* (Cambridge University Press 2013).

[101] Sir W.D. Ross, *The Right and the Good* (Clarendon Press 1930), 19.

[102] See Julian Rivers, 'Proportionality in Practice: the British Experience', in: Martin Borowski, Stanley L. Paulson and Jan-Reinard Sieckmann (eds.), *Rechtsphilosophie und Grundrechtstheorie: Festschrift für Robert Alexy* (Mohr Siebeck 2017).

to structure the reasoning process.[103] In the same vein I have argued that in certain normative contexts showing that a measure is capable of fulfilling a legitimate aim generates a presumption of proportionality which the claimant has to rebut by showing lack of necessity or lack of balance.[104] David Kenny has also commented on some of the complexities in this area.[105] Proportionality analysis never presents itself as a completely open-ended question. Not only does the ever-thickening context of precedent shape judicial perceptions of substantive weight, but numerous formal doctrines also guide the process of evaluation. Some, at least, of the debate over proportionality could surely have been avoided had the doctrine been located within the theory of legal argumentation more generally.[106] Here, the failure to notice the systemic connections between different parts of Alexy's work has had a particularly unhelpful effect.

This, I think, is the answer to Francisco Urbina's concerns.[107] He argues that proportionality is caught on the horns of a dilemma: the optimising conception associated with Alexy and Beatty offers the necessary constraint of a technical legal form but is vulnerable to charges of blindness to relevant moral considerations, irrationality in seeking to commensurate the incommensurable and illegitimacy in failing to filter out irrelevant or immoral considerations. However, an alternative conception of proportionality as open-ended moral reasoning associated with Kai Möller and Mattias Kumm is vulnerable to a different set of charges: its very open-endedness runs counter to the rule of law and fails to realise the goods of law-directed adjudication. What Urbina fails to observe is the fact that proportionality is always embedded in specific substantive and procedural contexts. As well as general formal structural principles such as the need for adequately reliable empirical premises and for sufficient statutory authorisation, there is the precedential context of specific branches of law. When a tolerably settled area of law, such as the civil wrong of defamation, is rendered subject to review for breach of constitutional rights, we do not start from scratch. Rather, the settled law is presumptively correct. But a new layer of reasoning is superimposed which allows the claimant to ask whether specific features of the law really do reflect our best view of the balance of interests at stake. It adds an element of openness which however does not mean we start all over again. Where a feature of the law is sufficiently problematic for a majority of senior judges hearing the case to agree that it should be changed, it can be changed. Most of the time it will not be.

It simply remains to note that all this vigorous debate is not carried on uniformly in all common law jurisdictions. In the United States, where other doctrinal standards of review predominate, and in Australia, which has limited opportunities for constitutional review, the debate is muted. However, In Canada, New Zealand, South Africa, the United Kingdom, and of course in respect of European regional instruments, the question of getting proportionality to work as an adequate framework for substantive review is arguably the most pressing doctrinal question within constitutional law of our time.

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[103] 'In Defence of Two-Step Balancing' (n 94 above).
[104] Julian Rivers, 'The Presumption of Proportionality' (2014) 77 Modern Law Review 409-433.
[105] David Kenny, 'Proportionality, the burden of proof, and some signs of reconsideration' (2014) 52 Irish Jurist 141-152.
[106] This point is well made by Matthias Klatt and Moritz Meister, *The Constitutional Structure of Proportionality* (Oxford University Press 2012) 51-56. See also Matthias Klatt, 'The Rule of Dual-Natured Law' in: E. T. Feteris, H. Kloosterhuis, H. J. Plug und C. E. Smith (eds.): *Legal Argumentation and the Rule of Law* (Eleven International Publishing 2016), 27–46.
[107] Francisco Urbina, 'Incommensurability and balancing' (2015) 35 Oxford Journal of Legal Studies 575-605.

5. CONCLUDING REFLECTIONS

The interconnections between Alexy's works which constitute its systemic character as a coherent legal-philosophical position have not hitherto been reflected in their reception in Anglo-American jurisprudence. Rather, each of the three main works has, for the most part, given rise to three quite separate debates. There are three stories, not one. *A Theory of Legal Argumentation* has, in spite of its championing by Neil MacCormick, failed to have a significant effect, and has become rather sidelined, a footnote to a debate which has hardly started. The *Argument from Injustice* has triggered an intensive and specialised debate at the highest levels within legal theory about the concept and validity of Alexy's non-positivism. And *A Theory of Constitutional Rights* has become a key text in what is now taken to be the 'orthodox position' within constitutional adjudication, receiving regular citation, application and development, but – the central doctrine of proportionality aside – meeting relatively little in the way of wholesale critique or alternative.

Why is this? At a superficial level it is simply a matter of the relatively contingent interests of textbooks. The debate between natural law and legal positivism forms a core component of every jurisprudence course; formal analysis of argumentation is almost entirely absent. Instead, one finds discussions of the common law, of Ronald Dworkin's work, of precedent and of statutory interpretation. What theoretical debate there is about reasoning and decision-taking is much more clearly rooted in reflection on the practices of law, rather than logical reconstruction. Where there are exceptions, as for example in the 2nd edition of J.W. Harris's *Legal Philosophies*, the brief chapter on legal reasoning is dominated by MacCormick's own work, with *Theory of Legal Argumentation* merely referenced in the bibliography. By contrast with all this, *A Theory of Constitutional Rights* has the advantage of being anchored in an important, and growing, part of legal practice.

Furthermore, the systemic character of Alexy's work has simply not been noted by commentators on one aspect or another of his work. George Pavlakos is absolutely correct:

> "It is unfortunate that most of Alexy's critics ignore the part of his work that sets out the philosophical background of his theory of constitutional rights. More careful engagement with it would probably have prevented a great deal of the misunderstanding that had occurred in the debate."[108]

This trifurcation is also perhaps evidence of the latent legal positivism within Anglo-American legal studies. Without always being articulated as a self-conscious theoretical position, it is simply assumed that questions of the nature of law, of processes of adjudication, and of the content of one branch of law (albeit the 'highest': constitutional law) can be detached from each other. At least as a working assumption it is not obvious to many why one should bother to look for interconnections within a wider conceptual framing.

This can be combined with the continuing gap between the philosophical assumptions of Anglo-American and continental jurisprudence. In a helpful essay, Aldo Schiavello notes the transition within MacCormick's thought from the legal positivism of *Legal Reasoning and Legal Theory* to the adoption of perspectives closer to Dworkin and Alexy in his later writings.[109] He suggests that a major difference between MacCormick and most Anglo-American legal philosophy and jurisprudence scholars is his remarkable and constant attention to European and Scandinavian [sic]

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[108] George Pavlakos, 'Constitutional Rights, Balancing and the Structure of Autonomy' (2011) 24 Canadian Journal of Law and Jurisprudence 129-154, 130 n 2.

[109] Aldo Schiavello, 'Neil MacCormick's Second Thoughts on Legal Reasoning and Legal Theory: A Defence of the Original View' (2011) 24 Ratio Juris 140-155.

jurisprudence and philosophy. He highlights MacCormick's adoption of a version of the claim to correctness ('law's pretension to justice') and the 'one right answer thesis', at least as a regulatory ideal, which reflects a commitment to a declaratory model of adjudication as opposed to a decisionist one. And Neil Walker was also surely right to observe that even Alexy himself was unnecessarily cautious in his assumption that *A Theory of Constitutional Rights* is rooted in the specificities of German constitutional culture.[110] Far better to see it as a contribution to global liberal constitutionalism.

Neil MacCormick's engagement with Alexy's work sheds interesting light on the question of its reception. Towards the end of *Institutions of Law* he briefly acknowledged his debt to the '"discourse theory"' of Robert Alexy, and in turn to Habermas, and beyond them to Kant.'[111] In *Rhetoric and the Rule of Law* one finds references to the Special Case Thesis, the concept of an ideal speech-situation, the rigorous testing of hypotheticals in the application of logical syllogisms, a moral theory which falls short of Thomistic value-realism, the procedural paradigm, the claim to correctness, the idea of the discursively possible, and the recourse to general practical reasoning.[112] Here one sees the ongoing legacy of his early admiration for *A Theory of Legal Argumentation*. *Institutions of Law* itself ranges rather more broadly over Alexy's work, including aspects of *A Theory of Constitutional Rights* such as the complex character of rights and the analytical, empirical and normative aspects of legal doctrine, as well as elements of the *Argument from Injustice*. Apart from that acknowledgement at the very end, references to discourse-theory are rather sparse.

What is then even more striking is the relative absence of discourse-theory in MacCormick's final work, *Practical Reason in Law and Morality*.[113] Apart from a couple of passing references to the Special Case Thesis, there is only one discussion of the importance of the discursive and controversial nature of moral deliberation as reflecting a commitment to the autonomy of moral agents.[114] Beyond that, it is Adam Smith who exerts the profoundest influence on MacCormick, and who fills the footnotes. Thus we find that Alexy came to have a major influence on MacCormick's theory of law, which is a moralised theory grounded in our obligations towards each other. But his underlying theory of ethics is a Humean one of moral sentiment, not a Kantian one at all. We find no reference, for example, to the discursive grounding of human rights. And this, in spite of his clear acceptance that legal reasoning is a special case of moral reasoning.

Perhaps Neil MacCormick was himself aware of the unresolved tension. At any rate, it confirms once again the validity of the maxim that while Kelsen was Kantian, Hart was Humean. In Anglo-American jurisprudence we have an intellectual climate which is friendly towards empiricism, hostile to idealism, friendly to interpretivism, hostile to logic and system. The dominance of empiricism means that legal positivism is more preoccupied with resisting the collapse into forms of realism than it is with natural law theory, which is more easily dismissed. One might say that the fundamental problem of normativity tends to be dissolved rather than resolved. There is, of course, a vibrant challenge from natural law theory, but this tends to be associated above all with the Thomist New Natural Lawyers. Even the more Kantian 'Sheffield School' which builds on the work of Alan Gewirth, tends to give the impression that law is an instrument to pursue objective moral ends which are

[110] 'Review of *A Theory of Constitutional Rights*' (2004) 24 Legal Studies 480-484, 484.
[111] Neil MacCormick, *Institutions of Law: An Essay in Legal Theory* (Oxford University Press 2007), 303.
[112] Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press 2005).
[113] Neil MacCormick, *Practical Reason in Law and Morality* (Oxford University Press 2008).
[114] Ibid 94.

'external' to law and distinct from legal practice.[115] Law – from its philosophical foundations to its daily instantiations – is simply not expected to form an entire system.

Reflecting on the immanence of morality within law leads naturally to a comparison with the work of Ronald Dworkin. But the frequent analogy which is drawn between Dworkin and Alexy is as illuminating as it is incorrect. There is of course substantial commonality in their insistence on the morally-inflected nature of adjudication and the internal connections between the content and theory of law. Even at a simple level their work shares features: they both seem to care a lot about principles! Yet Alexy's work is markedly more 'scientific', and in ways many pragmatic and politically-minded English-speaking legal theorists find too detached from legal reality. Dworkin's intellectual heritage lies with W.V.O. Quine,[116] not Immanuel Kant, and the resulting difference with Alexy's work is as marked as that between the Wittgenstein of the *Philosophical Investigations* and the *Tractatus*.

If the intellectual climate is generally cautious towards Alexy's philosophical style it is to the revival of English-speaking Kant studies that we must look to clear the ground. And here, there are signs of hope, as political, and more recently, legal philosophers turn their attention to him.[117] Perhaps that will enable the same intellectual journey to be retraced which leads from the *Metaphysics of Morals* to the indispensible role of law in general, and constitutional law in particular, in the only morally legitimate coordination of the actions of free and equal citizens.[118] More pragmatically, the latest edition of Raymond Wacks's *Understanding Jurisprudence* for the first time in a mainstream student text brings all three of Alexy's main works together. In an extended footnote referring to Radbruch in the context of the Hart-Fuller debate, Wacks notes the complete *oeuvre*.[119] Perhaps these are the first indications that Alexy's work will in time come to be treated as holistically as it ought.

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[115] Deryck Beyleveld and Roger Brownsword, *Law as a Moral Judgment* (Sweet & Maxwell 1986). See also Bev Clucas, 'The Sheffield School and Discourse Theory: Divergences and Similarities in Legal Idealism/Anti-Positivism' (2006) 19 Ratio Juris 230-244.

[116] Nicolas A. Alfonsi, 'Dworkin's Anti-Archimedean Jurisprudence', unpublished PhD dissertation, University of Cambridge, January 2017.

[117] See, above all, Arthur Ripstein, *Force and freedom: Kant's legal and political philosophy* (Harvard University Press 2009); S. Kisilevsky and M. J. Stone (eds.), *Freedom and Force: Essays on Kant's Legal Philosophy* (Hart Publishing 2017).

[118] See Patrick Capps and Julian Rivers, 'Kant's Concept of International Law' (2010) 16(4) Legal Theory 229-257; Patrick Capps and Julian Rivers, 'Kant's Concept of Law' (2018) 63(2) American Journal of Jurisprudence, forthcoming.

[119] Raymond Wacks, *Understanding Jurisprudence*, 4th edn (Oxford University Press 2015) 29 n 28.